SUPPLEMENT

TO THE

SECOND BIENNIAL REPORT

OF THE

STATE ENGINEER

LAW OF WATER CONSERVATION AND USE

ADDRESS BEFORE THE OREGON STATE BAR ASSOCIATION AT PORTLAND OREGON, NOVEMBER 17, 1908

BY

HON. WILL R. KING
SUPREME COURT COMMISSIONER

Published at the request of His Excellency,
GEO. E. CHAMBERLAIN, Governor

JOHN H. LEWIS, STATE ENGINEER

SALEM, OREGON
WILLIS S. DUNIWAY, STATE PRINTER
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LETTER OF INSTRUCTION.

SALEM, OREGON, November 28, 1908.

Mr. John H. Lewis, State Engineer, Salem, Oregon—

DEAR SIR: Inasmuch as the need of better water laws has been so keenly felt in different parts of the State, the address of Hon. Will R. King on the "Law of Water Conservation and Use," before the State Bar Association on November 17, 1908, is of considerable interest at this time.

In connection with the report of the State Engineer's department, you are authorized by law to recommend legislation along this line. If it appears that the suggestions made in such address as to administrative details are in harmony with the best practice in other states having effective water codes, I would recommend that you embody the same in your report, in order that it may be accessible to those interested in the subject.

I have the honor to remain,
Yours very respectfully,

GEO. E. CHAMBERLAIN,
Governor of Oregon.

LETTER OF TRANSMITTAL.

SALEM, OREGON, November 30, 1908,

Hon. Geo. E. Chamberlain, Governor of Oregon—

DEAR SIR: In compliance with your request of the 28th inst., I have examined the address of Hon. Will R. King on the "Law of Water Conservation and Use" and find the engineering or administrative details recommended to be in harmony with those now in force in the states of Wyoming, Nebraska, New Mexico, Nevada, Idaho, Colorado, Utah, North Dakota, South Dakota, and Oklahoma.

Effective water laws are had in all these states; the fundamental difference, however, appears to be in the method of determining rights to the use of water which were initiated prior to the adoption of such laws. In the first four states mentioned, such rights are determined by appointive administrative officers, subject to appeal to the courts. In the other states, by the courts direct.

The general summary of the address being in harmony with the recommendations as embodied in the second biennial report of this office, its publication as a supplement thereto will be of great value, because of the discussion from a legal point of view.

Very respectfully,

JOHN H. LEWIS,
State Engineer.

LAW OF WATER CONSERVATION AND USE.

Mr. President and Members of the Oregon State Bar Association:

The subject assigned to me is of such magnitude, that, within the short time to which I am necessarily limited, I can but give its prominent features a brief consideration. The benefits accruing to private owners, as well as to the public in general, from the application of the water supply to the most useful needs of industry and agriculture, are excelled only by those of the soil itself; the two go hand in hand. Especially is this true in what is termed the arid section of our State. And in what is known as the humid section of Oregon its untold advantage to agricultural interests will soon be appreciated. This can well be illustrated by reminding the owners of lands in the richest farming sections of the Willamette Valley, where they boast of abundant rains, that the same kind of lands for which they are glad to receive seventy-five dollars per acre will sell in the irrigated districts of Eastern Oregon for more than twice that price. The reason is clear; where irrigation is in use the moisture is received wherever and whenever desired, and during a season of the year when most needed, thus increasing the productiveness of the soil proportionately. This increased productiveness and value, as a result of the proper application of water to the soil, demonstrates the necessity of a system of laws safely guarding in every way the resources of such immeasurable value.

At the last session of the legislature, additional legislation was attempted. An irrigation code was prepared with much care, and carefully considered by various committees, representing the different irrigation interests, and recommended by the Governor in his message. but it was defeated, due to the activity of those who always fear that any legislation which will result in the greatest good to the greatest number will impede the progress made looking toward the monopolization of irrigation and water powers of the State. Some one has said, "Give me all the money of the world and I will own the people of the world." But with equal force and truth it might be added, "Give me control of flowing streams, water powers, and power sites, and I will own the land of the world, its people, and their homes."

This system of monopoly was well understood centuries ago and history records events when tribute was levied upon the consumer by those securing control of the water supply. In this State the forces that would have all pay tribute were, and still are, determined that any legislation looking toward the control of the water by the people and home builders should be defeated.

By the aid of members selected on account of their political affiliations, without reference to their appreciation of the fact that they should favor such legislation as would be most conducive to the interests of the whole people, a much needed irrigation code met its defeat.

The nation during the past decade has been awakening to a realization of the fact that many millions of acres of its best agricultural and timber lands have passed into the hands and absolute control of the few who through their foresight have availed themselves of the generosity of the Government in this respect and become the thrifty landlords of the country. Only in recent years have the lands thus generously bestowed been missed and the magnitude of the error of such policy fully realized.

A like wasteful and perhaps more ruinous policy has also been pursued with respect to our water resources. Not only have our water powers and water supply been steadily monopolized for many years, without practical resistance on behalf of our State, but there has also been, until recently, a rapid and unnecessary destruction of our forests, which has been permitted and until recently allowed to pass by unnoticed. Only by the protection of our forests can the permanency of our water supply be assured.

Every water suit of much importance contains evidence disclosing that the supply of water in the streams involved is not as abundant as it was in the early settlement of the State. Some assert that the supply grows less from year to year; but a careful inspection of the testimony along these lines reveals that as a rule about the same quantity passes down the stream during the year but earlier in the season, leaving less water available during the dry periods when most needed. Before the days of railroads; before there were farms in every valley; before herds of sheep, cattle, and horses grazed on every mountain range and grassy hillside, the timber, underbrush and grass stored up the rain, the snows being retained longer in the mountains, and conserved them till needed. Thus were the snows melted gradually, the spring freshets held in check, and waters more evenly distributed throughout the season. But with the rush of immigration and occupation of all available lands for farms and stock ranges

these conditions have been changed, and, added to the disappearance of the grass from the ranges and to the destruction of the underbrush from the foothills, have come the denudation of the forests about the headwaters of our streams, followed by the early rush of waters down the valleys, often carrying not only destruction along the way but with it a reduction of from one to two months period of the water supply heretofore available for irrigation. This condition, added to the increased demand for water, is the moving cause of practically all water difficulties and litigation.

It is manifest, therefore, that the State should co-operate to the fullest practicable extent with the Government in the protection of the forests at and near the headwaters of our streams, and thereby aid in the retention of these priceless resources. Some urge the construction of reservoirs for this purpose, and say, let the water flow but stop it on its course by means of dams constructed in the ravines, canyons, and natural water basins. In theory this sounds well, and to a great extent is practicable; but it overlooks the fact that many generations may pass before this can be done in every locality where the waste occurs, and that it is highly probable that the entire denuding of the forests may reduce the snows of winter and rainfall throughout the season, and leave less supply for the reservoirs when built. This may be but a theory; but it is a plausible one—one that is accepted by those who have given the subject many years of observation and study. It is a problem that perhaps only centuries of investigation can fully solve; yet one that by following the plan outlined for the conservation of the forests will certainly aid in its solution without the possibility of injury if erroneous. As a circumstance evidencing the probability of the correctness of such a theory, the memory of all the pioneers of the West, as handed down from the time of Lewis and Clark until the time when sawmills began to appear on every mountain side and in every canyon dotted with timber, records the hard winters, deep snows, and immense flow of the rivulets, creeks, and rivers in every valley throughout the arid sections. But now a winter seldom passes without complaint being made that there is but little snow and that the miner and farmer's water supply for the spring and summer seasons will be reduced accordingly. Hence, some system should be devised whereby the Nation and State may co-operate, not only in the protection of the watersheds by preserving the timber now remaining, but by replanting the denuded forests near the headwaters of all streams within the State.

That our State has not fully appreciated its water resources and resultant benefits, is manifested by its inaction with ref-

erence to laws looking towards the protection of these resources. This has largely been due to the fact that only a part of the State has been deemed arid and that there is a corresponding lack of interest throughout the so-called humid sections. However, when once the subject is fully understood, it will be found that there are no humid sections. As before observed, there is no part of the State in which irrigation at times would not greatly enhance the productiveness of the soil. But a want of realization and appreciation of this fact in the most thickly populated sections of the State has retarded the development of irrigation and held in check legislative enactments on the subject. Only a few years ago a constitutional amendment patterned after the Constitution of Idaho on the subject was rejected by the people; yet, as a result of the same constitutional provision, Idaho has advanced to the front rank in irrigation enterprises and development. One corporate enterprise alone in that State along the Snake River Valley bids fair to excel any yet undertaken in Oregon, either by private or corporate enterprises, or of the Federal Government. One equally as great was contemplated by the Reclamation Service in Malheur County, but finally rejected, and the millions of dollars set apart for that purpose withdrawn, largely due to the condition of our laws, making it necessary to remove to where there were less private holdings and more Government land for reclamation. In Idaho, however, the fact that large areas were in private hands served as no impediment, and the work is progressing. This is but a few miles across the line from Malheur County, where a like project was abandoned in Oregon. Much unjust criticism has been made against the Reclamation Service because more enterprises under the Reclamation Act are not undertaken in our State. In this connection we hear it often observed that Oregon furnishes more money from the sale of its public lands than any other State. And this is true; but this criticism overlooks the fact that all public lands in Oregon, like those of all States except Texas, are the property of the people throughout the Nation—the property of the Government and not of the State.

Although our State has, through the sale of public lands sold within its borders, furnished more money to the reclamation fund than any other State, yet we are, and will continue to be, estopped to complain that our *pro-rata* has not returned until we can take a more forward step in irrigation legislation, or until we can at least be placed on an equality in this respect with our neighboring States of Idaho and Nevada.

Some, with strong hopes, look to the courts for the desired relief, but it must be remembered that the courts should only interpret laws, not make them. It is their sworn duty not to determine what the laws should be, but what they are.

And in this connection it has been aptly observed that it should always be kept in mind that it is a dangerous policy to uphold a little wrong, that much good may come from it. In other words, a precedent established contrary to the well-settled principles of law, even though it might in that particular case subserve the ends of justice, may in time become a weapon of great injustice.

Under the abandoned but once contemplated project in Malheur County alone the permanency of 10,000 homes in that section would have been assured. But let it be remembered that a like number of homes in any other State or section of our country is of like benefit to the Nation at large, although a loss to our State locally. It may share in the general benefits, but must lose from a direct and local standpoint. It is immaterial, therefore, to the Government that its projects must go elsewhere. Nor is it justly open to criticism for seeking fields of operation where the laws are most conducive to the successful operation and maintenance of the works intended by the Reclamation Act. The Government can construct its work and, until paid for by the water consumers, control its management in a general, and to some extent special manner.

But some system must be devised whereby it can, before commencement of operations, determine the available water supply. If we believe the records of the State, there is no available water supply; from actual computation it is found that in Eastern Oregon alone the records show appropriations of water sufficient to make sixteen rivers of the size of the Columbia during its low water flow. This abuse should be remedied that we may know which are the *bona fide* and which are the abandoned and over-recorded water rights. And some system of adjusting the private holdings, by condemnation or other lawful means, should be provided.

What applies to the encouragement of Government projects will with equal force apply to the encouragement of private and corporate enterprises. The States of Idaho, Wyoming, Nevada, as well as the States of Utah and Colorado, are twenty years ahead of Oregon in this respect. California, through its development of the irrigation district system, also has many advantages over Oregon. We have a similar district law, but thus far, with but one exception, it has not been taken advantage of. This law when once applied will, in many of the localities by its community ownership and

management and distribution of waters used for irrigation, solve the problem, but will not meet all contingencies. It is more suitable for large and densely settled localities where rights are practically determined and added irrigation works are needed to conserve the water supply by means of reservoirs. The law as it stands should be remodeled and amended in many details. It was patterned after the Idaho irrigation district act, which has been in use there for thirteen years since our district law was enacted. This long experience there has called for many changes, which have been added from year to year, until its success is now unquestioned. Under that system a large percentage of the valleys in that State are now being successfully irrigated. We would do well, therefore, to profit by Idaho's experience and add the amendments there found necessary, to our present district law. In short, much time would be saved by adopting the present Idaho law as a whole, with such modifications as are essential to its adaptation to the different conditions of our State, if any. But I know of no obstacle, constitutional or otherwise, in the way of its adoption and successful operation here.

But on some other important matters of legislation we find our State Constitution insufficient to permit all the desired relief. In fact, I believe the most effective step that can be taken looking towards the solution of our many intricate irrigation problems, to say nothing of the solution of many other questions arising from year to year, would be the adoption of a new constitution, one fully adapted to the many new conditions of the present day, but few of which were even dreamed of at the time of the adoption of our present constitution.

Let the coming legislature do what others before have long neglected to do, and provide for the calling of a constitutional convention. This would enable a convention of representative citizens from all parts of Oregon to meet in session for that express purpose, with sufficient time at their command not only to eliminate many of the extinct and useless provisions of the organic laws of the State but to straighten out many of the crooked turns which have long proved obstacles to our progress. The constitution at the time of its adoption was a great work and answered the purposes of that day and for many years following; but all the combined wisdom of the world could not then have foreseen the wonderful progress to be made within the fifty years to follow and have provided a consitution fully adapted for even the generation then to follow—much less for all time.

In the reclamation of arid lands the question is often asked as to why Idaho, Wyoming, Colorado, and some other States progress more rapidly than Oregon. Various reasons may be assigned, one of the principal ones being that they recently came into the Union and with constitutions enacted under conditions in that time a half century ahead of those existing when our State had its birth. These new commonwealths accordingly declared that the waters of their streams belong to the State. The State assumed control of the water resources, and through its legislation provided a means and manner of diversion, and established a system of recording and protecting water rights. In doing so they were not met on every progressive turn with inhibitions in the constitution; there they found protection and encouragement in such progressive work. In place of looking to judicial interpretation to pave a way they turned to the law-making body created for law-making purposes, to which, in this State, with its outworn constitution, we too often look in vain. Constitutions have long been, and we hope will forever continue to be the safeguard of the liberties of the people of every commonwealth where adopted. They serve to protect them from the selfish attacks and greed of power, which power in all governments and in all ages, when unchecked, has passed into the hands of the few, and eventually led to monarchial rule; but it, like the clothing of individuals, occasionally needs replacement with new and up-to-date material. A nation's organic laws must be kept apace with its progression. Patches by amendments, it is true, serve as an aid; but the process is too slow to keep pace with this day and age of electricity, steam roads, interurban lines, and flying machines. Give the people another opportunity to select an able body of representatives, to meet in a sixty-days' session, who will devote their whole time and energies, in the preparation for submission to the voters, of a new *magna charta* for our State. In this manner the best features of the old will be retained, dead letters discarded, and such new material added as our present time progress, and changed conditions, demand.

All must concede that abler and more patriotic men can not be found than those of whom the convention of 1857 consisted. If, in those trying days with but 5,000 voters in Oregon from which to select its delegates, such an able and representative body of statesmen were found, Oregon today, with more than 100,000 eligible men from which to select constitutional delegates, should be equal to the emergency and accordingly find another body of patriotic statesmen equally as able to remodel and made more substantial the

foundation of our State, erected under the disadvantages of that day and time.

Amendments from year to year are too slow as well as less effectual, and add as much to the complications as to the solution of many of the problems of state. But a few years more and our best resources will pass beyond our reach and we again will hear it remarked that the door is locked too late. An amendment, referred to, respecting irrigation, taken almost verbatim from the Idaho Constitution, was voted upon only ten years ago and defeated, notwithstanding Idaho adopted it without opposition. Ten years have elapsed without another attempt; and I dare say, if we await results from this plan the desired purpose will never be accomplished; what is the business of all is the affair of none. Our public lands passed beyond the reach of the people before their value was appreciated. About half of the best lands were practically given away under special grants. Our forests have been meeting with a similar fate, and the water powers and public streams are fast passing from the people, or the public. When these resources have all departed we will miss them; but while abundant, have passed them by. History records: "Seven cities mourned the Homer dead, from which the living Homer begged his bread." While he was among them he was neglected; but when gone they wanted him. This is the possible fate of many of our natural resources, to avoid which we must act, and act at once.

In this State we have had too much of that sentiment, "Let the future take care of itself; let every one look out for the present;" "every one for himself, and the devil take the hindmost." We frequently hear our friends urge that we need no statutory provisions; that we should leave it to the courts; that they will pull us through, etc.; but my observation has been that they who advocate such remedies are usually the first to complain when it is suspected that their remedy has been applied. And this complaint is sure to be heard from the land and cattle kings. The burden of the song is "let well enough alone." It is this class that usually wants to retain the old common law doctrine of riparian rights with all its ancient and outgrown customs annexed. They advocate not that "water irrigates; let it irrigate," but say, "it runs; let it run." In other words, "let the beautiful stream continue to bubble down the mountain side singing the sweet song of prosperity, so that the stock may continue to come down to drink, with only the large stock ranches and cowboys to be seen for miles away." Harney County has one of these farms of from one to five miles in width and thirty

miles in length. Here the stock come down to drink and the water runs; but no homes are seen to grace and civilize the vast area represented by this immense farm. This is but a sample of others throughout the arid West as well as in our State. Those who believe in seeing the large cattle ranches replaced by small farms and homes, and their owners by their industry civilize and build up our commonwealth, thus furnishing inducements for the construction of railway lines and assuring progression and prosperity, should favor the legislation that has long been tried in our nearby and neighboring States, where happy homes have replaced the stock farms and ranges, giving in lieu of the sparsely and scattered settlements the populous valleys dotted with their many cities and towns.

But in considering the needed legislation it is often confused with the laws we have. I have sometimes heard it remarked, and believe, that if we should codify all our laws on the subject, as handed down to us through the common law, judicial construction, and application thereof, including those embraced in our statutes, adding nothing new, and frame them into one bill and attempt to have it passed by our State legislature, it surely would be defeated. We would find lobbyists from all parts of the State, representing special interests before the committee on irrigation and explaining the disastrous consequences that would ensue if such a code should be adopted. Telegrams opposing its passage would come from Umatilla County, from owners of large projects fearing for the welfare of their projects. Some of Jackson County's citizens having private enterprises at heart would be on hand, and the wires from Harney County would soon become warm with advice to the effect that a committee with opposing petitions would soon arrive to assist in killing the bill, saying, "Water runs; let it run; cattle drink; let them drink," but "kill the bill." Telegrams protesting against it would be sent by every large ditch owner, including Malheur County, to those whom the papers announce are favorable to its passage. The roll call would begin; some would be seen to dodge it; while others would be found absent who but a few hours before were strongly in favor of it; and the bill would be lost—gone the way of all that tried to come before. And all this opposition would overlook the fact that the objectionable features thus giving rise to such opposition are, and long have been, the laws in force in this State, and that they will continue to impede our progress until progressive action is taken. This picture is not overdrawn. I put in thirty days during last session trying to procure some irrigation legisla-

tion. In the bill were necessarily included some features which were but declaratory of present laws. This was due largely to the difficulty in segregating them. Again, it was thought best to include some of our present laws so that as complete a water code as practicable might be enacted. But lobbyists soon appeared from different sections opposing it; and we found more opposition stirred up by reason of features included in the bill which had long been the law than by the intended new laws not heretofore in force in this State. This to us looked absurd, but it answered the purpose for those determined to block legislation on the subject. It changed votes that could not have been reached in any other way. The bill was defeated and irrigation projects contemplated as well as those long in use have suffered accordingly. The bill lacked but three votes on final ballot, two of which were the result of members absenting themselves during roll call to escape voting thereon. Some irrigation projects have prospered in spite of the insufficiency of our laws, but not as a result of it. For every dollar invested in this line and for every acre reclaimed in Oregon, I can take you to Idaho and show you at least ten dollars invested and acreage in proportion reclaimed within the same period of time; and their natural resources in that respect do not excel ours. The difference is due to our laws; they are more secure there than here. If they want the rights adjudicated on a stream so that they may determine the surplus water, a method is provided whereby a suit may be brought, a survey ordered by the court, the survey made by the State Engineer, of whose data, plats and information gathered and recorded by him the courts may take judicial knowledge. A suit is then brought and rights determined, that they may know the available water supply at hand.

The inefficiency of our statutes along these lines, as well as the impracticability of the courts bridging over the many deficiencies, has been fully demonstrated by many years of experience. Court decrees only bind the parties thereto, and in many cases soon prove inadequate to do justice even between them, as climates change, affecting the water supply, to say nothing as to the effect brought about by subsequent appropriators and increased use by those not parties to the suit. To meet the new conditions as they arise, decrees should, to a limited extent, remain under the control of the court to meet unforeseen emergencies.

One of the problems with which we are confronted is the lack of some definite system of water right titles. As a result the water rights, as a rule, are uncertain both to the water user and investor. Any person can acquire a *prima*

facie water right in this State by posting a notice at the proposed point of diversion, stating the amount of water claimed and the intended use, and recording the notice in the county clerk's or recorder's office within ten days thereafter. If the water is to be used for irrigation purposes, a copy of the notice should also be filed in the office of the State Engineer. It is immaterial that waters of a stream have already been fully utilized at points below. The notice may specify any amount, even though such amount exceed the entire flow of the stream. It may be impossible to use the water beneficially for the purpose as claimed, and, as a matter of law, the appropriator may be limited to the quantity thus applied within a reasonable time; but that makes no difference, so far as the *prima facie* right thereto may be concerned. So long as construction is commenced within six months, your title to the water susceptible of appropriation and included in your notice is thus apparently complete, but the record is not completed by the filing of proof that work has commenced. By refiling every six months, a water right can be held indefinitely without use, and legitimate development retarded. The term "prosecution of work with due diligence" is very indefinite and it is possible, in some instances, and often happens, that it means the indefinite employment of but a single man at the intake, often making it almost impossible for a legitimate investor to secure a water right without paying the hold-up price of the man filing the notice, sometimes called the "notice man." Such "notice men," who retard the development of our water resources and energetically oppose the enactment of beneficial laws, by proper regulation can be eliminated as easily as was the same class, who, in the early days, retarded the development of the mining resources of the West by merely posting his notices, etc. The payment to the State of a certain fee, based upon the amount appropriated or the theoretical power to be developed, should take the place of the mining requirement of labor before filing the notice. "Final proof" on all water appropriations should be made within a reasonable time after filing the notice, and not to exceed five years for the largest project. At the expiration of, say, half the time allowed, proof that at least one-fifth of the work has been completed should be filed, so that the public may know if work is under way and the right liable ultimately to become vested. Upon completion of the work, final proof should be made, and a water right, or deed of some kind, issued by the State, thus removing one of the most serious obstacles to irrigation development.

A clear and forcible illustration of the defects of our present

system may be found among the irrigationists along the Walla Walla River in Oregon. One hundred and ninety ditches there divert water from the stream within a distance of ten miles. These ditches supply water for the irrigation of but five thousand acres, furnish power to mills, factories, electric light plants, etc., and for domestic purposes. During the last thirty years, various suits have been instituted, endeavoring to secure a just distribution of the waters, the most recent being filed about three years ago, involving more than four hundred interested parties along the stream. This is still pending, and none of the previous litigation has afforded any definite results. Instead, rights have gradually multiplied and are becoming more complicated and uncertain. The early settlement took place during the sixties in the lower valley. Others settled above, diverting water; old rights were constantly enlarged; and conditions became such that water was diverted by appropriators without reference to any rules or regulations and without regard to the rights of others.

In 1905 a suit was begun in the circuit court, involving almost all these parties—more than four hundred, including corporations, diverting water from this stream. About twenty-five lawyers were retained to defend the various rights. A decree has not as yet been entered by the lower court. In time, the case will doubtless reach the Supreme Court and the relative rights of the parties there be determined. In the meantime, new rights are being initiated, old ones enlarged, and the same conditions which brought on the present suit still exist. The decree, when rendered, will be effective as a basis for distribution of water between the parties to it, leaving for further adjudication the rights of subsequent claimants. Storage will, perhaps, ultimately be provided on the headwaters of such stream and the attempt made to convey such water to lands in the lower valley. This in itself will add to the difficulties of enforcing the decree when entered. New litigation will, therefore, follow, and, under the present system, uncertainties will thus continue. The burden on irrigated agriculture will, accordingly, grow, of which the above is but one of many illustrations that may be given, much of which can be avoided by proper and timely legislation. But the cost of distributing the water of the stream alluded to, under State supervision, would be insignificant as compared with the present system; would result in the restoration of order, safety, and added prosperity to that community.

An administrative system similar to that in use in Nevada, Wyoming, and New Mexico would furnish the police powers essential to the enforcement of the various rights without

unnecessary delays or expense, and I believe some system of this kind will soon prove absolutely necessary in every irrigated section of the State where more than a half dozen water users may be found in one locality; unless the irrigation district system is applied; and even then in some localities the district system may prove unequal to the emeregncy. The irrigation district law is provided with an effective administrative system for distribution of waters within the district, and is in some respects similar to, and as effective as, other municipal corporations. In fact, the management and control of water for irrigation, manufacture, and all useful purposes must eventually be and remain a matter of public concern, but local in its application, to the same extent as the affairs of municipalities.

Some definite system of recording water right titles must be devised whereby the titles may be abstracted as are land titles. The Torrens Land Act has proved the most effectual system for recording land titles, and its provisions should be extended so that the title to water may be registered either as an appurtenant to, and in connection with, land as registered, or by separate and distinct proceedings instituted in some similar and as effective a manner. To encourage this, some system of rebating part of the taxes might be provided for those whose land and water titles are thus registered, furnishing thereby an inducement for a settlement of these rights during the lifetime of available witnesses. All clerk and court fees in such cases could be removed, except the sinking fund as now provided for the recompense of those who without notice unjustly and unwittingly may be affected by such decrees.

Again, some more convenient method should be devised for perpetuating testimony for use in future controversies likely to arise after the death of those most cognizant of the facts. The statute of limitations as to water right titles should be reduced to five years. This is the period of limitation long in force in California in reference to all claims affecting both land and water. The passing away of the old settlers, who are so often the only witnesses to such controversies, will soon make such change necessary here. Our present laws on the question should be simplified. In fact, I believe the constitution should be so amended as to permit a separate, more convenient, and less expensive system of adjudication of all such rights. A special tribunal should be created to try that class of disputes, with such other matters as may be incidental to them, one of the members of which should be a person fully versed and experienced in irrigation and

civil engineering. The right of appeal should be given from such commission, but judging from the experience of other States where this system has been tried, this would seldom become necessary and but rarely occur.

The administrative system should be such that when the rights of the people in a community are determined, a person with sufficient police powers could be selected and placed in charge, where deemed advisable by the local court, as would insure enforcement of such rights without the necessity of resorting to the slow and cumbersome method either of damage suits or of contempt procedings.

Under our present system, if a man steals from you a ten-dollar horse he is subject to imprisonment for ten years; but if he forcibly or otherwise takes the water from your irrigation ditch without your knowledge or consent, causing you to lose a thousand-dollar crop, you can await a session of circuit court, to convene probably six months later, when you can sue for damages and secure, perhaps, a worthless judgment, or in some instances have the offender fined a few dollars for contempt of court and told to sin no more. Many infirmities in our present system could be pointed out, but I will pass on.

In most States which have assumed control of their water resources, the State Engineer is made the head of the administrative system. In his office will be found a complete record of all water rights as initiated and of old rights as determined by the courts or by an appointed commission. It is made the duty of such engineer, in case of shortage on any stream where the records are complete, to regulate diversions so that vested rights may be protected. To accomplish this, the State is divided into three or more divisions, following important drainage lines, these water divisions being further divided into water districts. During the dry season, a water master, or policeman, is appointed to apportion the water in the stream among the different canals in his district. These water masters report to the water commissioner in charge of the respective water divisions, who direct the distribution of water, under the supervision of the State Engineer.

Such an administrative system for the orderly distribution of water can be provided without cost to the general tax-payer by compelling the future appropriators of water to pay a reasonable fee or license for the privilege. However, a part of the burden should more properly be paid by those directly benefited. This may be accomplished by compelling all water users to pay an annual license to the State, based upon the amount appropriated or the theoretical power developed by

the appropriation as made. Such a license system, in addition to meeting the cost of administration, would be of great benefit to the public in two ways: (1) It would have a tendency to reduce extravagant and excessive claims to water, and (2) prevent its waste.

The experience of Wyoming has demonstrated the wisdom of leaving all water adjudications to an appointed board, subject to appeal to the courts. The most complicated case in such State has invariably been decided within one year, and usually within six months. Up to July, 1905, over five thousand ditch rights, which had been initiated prior to the adoption of the Wyoming law, were determined by such commission. But seven appeals to the courts were taken from these decisions, and such appeals affected less than fifty ditches, the cost therefor to the ditch owner not exceeding two dollars per ditch, the balance being promptly and properly paid by the State.

The State Engineer is there made president of the board of control. In one of his recent reports, in referring to recently appealed cases, he remarks that "the last case before our State Supreme Court was in the courts of the State for fifteen years. All of the parties interested in this suit are bankrupt today. Their lands have passed into the hands of others. The same determination would have been reached by the board of control within six months without expense to the water users. An administrative officer understands what information he must secure before he can determine a right. The court must depend upon biased testimony from both sides, or all sides, and then guess at the truth. Where only circumstantial evidence is obtainable, or where some point of law has to be interpreted, the court is unquestionably the tribunal to which the matter should be referred, but where simple fact and evidence have to be obtained, and where this can be secured largely by surveys and measurements, there is no question in my mind but that such work should remain in the hands of administrative officers."

It further appears from his report that the cost to the public for adjudications in that State during the past two years, assuming the board to have no other duties, was $11.46 per ditch right, or about ten cents per acre. (See report by Clarence T. Johnston, State Engineer, on October 22, 1908.) These adjudications affected 2,172 rights to the use of water, and 210,290.73 acres, without an appeal in any case.

The advantages in the commission system of adjudicating water rights are (1) that such commission can be composed, not only of lawyers, but also can include at least one engineer

experienced in irrigation practice; (2) that the experience gained in each adjudication is carried to the next hearing, this being, perhaps, in another judicial district; (3) that the commission can examine conditions in the field, order surveys and the gathering of other engineering data where necessary, and (4) a speedy adjudication made through freedom from the tedious delays necessary in court procedure.

A case is reported in one of the adjoining States that clearly illustrates the advantages of the commission system. "The plaintiff was granted a prior and first right to twenty second feet of water—the decision of this court being based upon the preponderance of evidence submitted to it and taken to be correct. An expert district engineer, upon personally examining the premises, would have ascertained positively that the ditch of the successful claimant could not under any condition carry more than eight second feet. Yet, under such system, the plaintiff in that action stands, by a judicial decree, with a recorded title of more than twice the volume of water which it can actually carry in its ditch and apply to a beneficial use."

In one county in this State it appears that decrees were entered in the circuit court (but not appealed), as follows: "M," the lowest appropriator on the stream, obtained a decree for two hundred and ten inches of water against all others above him on the stream excepting "L," who is at the head of the stream and not a party to the suit. Later "C," whose farm, with water right, is situated between these two, obtained a decree against "L" for two hundred inches. Thereafter when a shortage occurred "C" would demand of "L" to let the water run to him, but when it was turned loose for that purpose, could get no water under this decree, for the reason that when the water reached his premises "M" would compel him to let it run on to him, under the earlier decree in favor of "M" and against "C." When found passing "C," "L" then demands it as against "M." Query: Under this situation, who gets the water?

An interesting case is also reported from California, where similar conditions prevail. "Ditch 'A' sued Ditch 'B' and upon sworn evidence introduced, obtained a decree giving it a priority of twenty second feet. Ditch 'B' sued Ditch 'C,' with the same results, and Ditch 'C' thereafter sued Ditch 'A,' with the same result, and there were still thirty-five ditches on the same river, the priority or inferiority of whose rights had not been determined. The three judgments referred to are not practically worth the cost of filing the complaint." A similar illustration is given and this feature discussed in

Hough *v.* Porter (Or.) 95 Pac., at page 748. The anomalies above given could not have occurred had all rights been determined in one proceeding.

In recognition of the reclamation act, and with a view to the adding of the contemplated projects under it, three years ago some legislation was enacted in this State. The office of State Engineer was created, but the powers granted are few. A most capable and efficient person was appointed to fill the office, and within the three short years he has held the position the valuable services rendered by him have fully demonstrated the wisdom of this official department of our State. An illustration of the benefit to be derived from the establishment of this office is that of the suit on the Walla Walla River alluded to. The act creating the office of State Engineer permits the court, where the State and Government is made a party, to direct a complete survey to be made of all lands, ditches and reservoirs involved and report the same, arid sections of the State is that of ldrainage. Experience with all obtainable data to the court. In this case the State was made a party and the survey ordered. The survey was made as ordered and all necessary plats and data furnished, including stream gauging and measurements. This work required one year's time for its completion, but I feel safe in saying, as one of the attorneys for the plaintiffs at that time, and instrumental in procuring the order for the measurements and survey, that by this method thousands of dollars have been saved to the litigants. There will probably be three thousand pages of testimony when the case is finally submitted, but without the surveys and plats, stream measurements and other data furnished, not less than eight to ten thousand pages of testimony would have been necessary. The time saved to the court alone, to say nothing of the benefits accruing to the litigants, more than compensates the cost of the survey. Some doubt exists as to whether, under the present statute, such survey can be ordered if the State or Government is not a party. This doubt should be removed. And the State or county, on some equitable basis, should pay at least half the expense incurred, the remaining half to be paid by the litigants in proportion to the benefits received as determined by the court. Both the State and county are benefited to such an extent that a payment of even the entire cost would, in the end, be a profitable investment. The expense saved in trials growing out of disputes having their inception, and arising directly as well as indirectly out of such matters, would, in the end, more than reimburse the outlay.

Sufficient funds should be provided, to be used in connection with the aid furnished by the Government in this respect, for the gauging of all streams and for the ascertainment of all the available water supply in every locality throughout the State. This will take much time and money, but millions of acres are susceptible of reclamation under the Carey Act, the taxes upon which, alone, when reclaimed, would soon repay the expense incurred. Until some method is provided for the securing of this information, but few, if any, lands will be successfully reclaimed under this act, and every acre unreclaimed adds to the State's loss.

The important questions, which, like the ghost of Shakespeare's day, "will not down," and the ones among those difficult of determination as they arise, are questions involving riparian rights. It is well known that, under the common law, a riparian owner was entitled to have the stream flow by his premises undiminished either in quantity or in quality, except such as might supply the natural wants of the other riparian proprietors. It is said that if such proprietors could consume all of it by their natural wants they were permitted to do so. However, it is doubtful if at common law they could, by large herds of stock, consume it all to the prejudice of others riparian to the stream. Nor, as was held in Salem Flouring Mills *v.* Lord, 42 Or. 82, can all of it, under all circumstances, be thus consumed to supply the natural and domestic wants and needs of a riparian proprietor. Some States have held the doctrine inapplicable to the conditions in the West and adopted that of prior appropriation as the basis of all rights. It occurs to me that as a choice between the two doctrines—riparian rights and prior appropriation—as they are usually understood, "prior appropriation" is the better, and the one most suitable to the conditions of this day and age, as applied to our Western climates and soils. Some States, however, including ours, appear to hold to the modified doctrine, to the effect that a riparian owner, as between himself and other riparian proprietors, may consume a reasonable quantity of water for irrigation, providing it is used in such manner as to permit its return to the stream before it reaches others on the stream below. However, the return of the water without substantial depletion is impossible if used for irrigation. As a matter of practice, only the surplus diverted can be thus returned. As a rule, after diversion not less than two thirds is lost by percolation and evaporation. And I might pause to ask if this is not, then, an *appropriation* of water in the fullest sense of the term. Thus we find the doctrine of riparian rights, under its so-called modified form,

greatly extended, even in those States where riparian rights are recognized. Under the ancient rule it could be used only for stock, domestic, and power purposes, but now we find that not only a reasonable supply may be consumed in that manner but added thereto is such reasonable quantity as may be necessary to allay the thirst, not only of the owner, his family and his stock, but of the soil as well. But, while our courts have held the riparian owners to be entitled to a reasonable quantity for these purposes, nowhere do we find in any judicial decision the term "reasonable use" *fully* defined.

In the application of this phrase, let us take, for example, the lands near the head of the Deschutes River. If a company owning thousands of acres of these riparian lands at that point has permitted the water of this stream to flow unused within its banks for half a century, during which time the non-riparian lands of the country below have become dotted and settled with valleys or happy homes, including towns and farms, may it now, or even at a future time, assert its riparian rights, demand the waters of this river for the irrigation of its riparian lands, even to the consumption of the water of the entire stream, and thus prevent the water for irrigation purposes from reaching those well-established towns and thriving farming communities, making their lands valueless, to their financial ruin? Or will justice and equity intervene and hold that so long a delayed demand should not come within the term "reasonable use," or reasonable application of its riparian rights? The extensive development of the unreclaimed lands must soon confront the courts with this problem. If it is within the power of the courts to determine these matters on an equitable basis, under the facts of each particular case as it may arise, the solution is not so difficult; while, if it is a legislative function only, it becomes important that legislative relief should be afforded without delay. Much assistance, to say the least, may be afforded in the solution of this problem by a legislative enactment defining riparian rights, determining what is a reasonable use and application, how it shall be ascertained, what are riparian lands, the limit thereof, and the establishing of a limit of time that water may remain unappropriated by a riparian owner before being deemed abandoned. I am of the impression that "reasonable use" and application under such circumstances is somewhat like the words "public policy," as to which no fixed and inflexible rule can safely be applied, but must of necessity be left to judicial determination under the particular facts in each case, as the questions arise. And this appears to be the tendency of the latest decisions bearing on the subject and ultimate

effect of the holding of the United States Court of Appeals in Andrew *v.* Baraman, 140 Fed. 14, and of the United States Supreme Court in the recent case of Kansas *v.* Colorado, 206 U. S. 46. (See also decision in same case in 185 U. S. 125.) But if a legislative solution is possible, it should be furnished. Legislative declarations of the law are, and should always remain, more satisfactory than any judicial interpretation, accompanied by even a suspicion of what is sometimes termed "judicial legislation."

Another question of great importance to all of the strictly arid sections of the State is that of drainage. Experience among irrigators has developed that it requires but a few years of irrigation to bring to the surface the alkali in the soil. Also, that the alkali in the soil of the higher lands is, by percolation, forced to the farm below. The reclamation of the bench lands thereby in time destroys the valley farms, unless some system of drainage is provided. This is usually neglected, the result of which is that much of the litigation of the future growing out of the use of water will come from this source. The determination of these controversies should be facilitated, as well as where possible prevented, by statutory enactments applicable to these new conditions, and not left entirely to the common law, which is often inadequate for new conditions in the arid West. A measure of damages should be fixed, as well as the manner of ascertainment thereof. When deemed essential by the court, surveys by State engineers should be ordered to determine the facts involved in any litigation, and all surveys, plats and data thus gathered should become a part of the records of his office and, like that in reference to all questions concerning or growing out of irrigation, should become *prima facie* evidence of the facts disclosed by such records, of which the courts should be permitted to take judicial knowledge.

OPERATION OF PROPOSED LAW.

If the plans I have briefly outlined should be adopted, their effect, briefly stated, would be as follows:

A central office will be provided, where a complete and reliable record of all water rights as initiated, or of early rights as determined, can be found. This should be the State Engineer's office at the Capitol, following the experience of most Western States. It will be virtually an abstract office for water titles. A letter addressed to this office will bring by return mail a definite statement as to the amount and priority of any recorded right, whether vested or only initiated. If a prospective investor desires to know the total amount

of vested rights to water from a stream in order to ascertain the amount of surplus water, eventually this can be furnished without delay.

The penalty to make such record complete and of value to the public will be that no right to the use of water from any public stream can thereafter become vested except upon compliance with law and complete record in the central office.

This law will not rest upon any specific constitutional provision concerning water rights as had in Wyoming, but will, as in such State, be supported solely and entirely under the police power of the State.

If surplus water is believed to exist in any stream, a definite method of procedure will be provided whereby a vested right to such water can be secured.

Instead of posting a notice in the brush on the bank of a stream where no one can find it, as under the present law, the date of priority will relate back to the date of receipt of an application in the central office. Any application which is in proper form, as prescribed by law, can be filed then as now. Notice of such application shall be given by publication in a local paper and a time set to hear and consider any objections by those who may be injured by such diversion. The application will be limited, however, for irrigation purposes to the maximum quantity of water, as prescribed by law, and a time set, not to exceed five years, for the completion of such works, and not to exceed four years in addition thereto for applying the water to a beneficial use, before the application is granted. If, upon complaint, two-fifths of the work is not done in one-half the time allowed, as determined by the administrative officer, the water will revert to the public and become subject to reappropriation. Upon completion of the works, proof of such fact is made, the works inspected, their capacity determined, and a certificate issued. Upon application of the water to any beneficial use within the time allowed and as specified in the applicaton, a license or deed to such water will be issued by the State. The records will be extended each step, so that the public is fully advised in case further development is planned.

Water appropriated for irrigation purposes will become appurtenant to the land irrigated and no other. Upon abandonment of its use for a number of years, as specified by law, the water will revert to the public.

Speculative filings can be prevented by a sliding scale fee, payable to the State at the time of application. This should, as in Idaho, pay all administrative expenses, and will not dis-

courage development, as the public record and protection granted the investor is worth more to him than it costs.

If the regular stream flow proves inadequate to supply all appropriators, the last appropriators will be shut off in order of priority by the administrative system, as heretofore explained. This includes a more practical method of distributing water by periods of time, sometimes termed the "rotation method." Vested rights are thus protected without the State assuming the responsibility of determining the exact amount of unappropriated water in a stream. This is a matter of some uncertainty, due to annual and seasonal variations in stream discharge.

Storage permits will be granted upon application, the same as described for appropriation of the regular flow. The stored water, when released into a natural stream channel, will be protected by the administrative officers, and the full amount recovered, less that lost by seepage and evaporation, at any point below. The discharge from the numerous reservoirs which will ultimately be constructed on the headwaters of most streams will be regulated by the State. It is of no consequence to the owner of a reservoir whether he recovers the water stored by him or by some one else, so long as he receives its equivalent.

RESULTING BENEFITS.

I believe the following benefits will result from the adoption of such a water law:

1. Those now using water will eventually, when invloved in litigation, be able to have their rights definitely determined and thereafter secured against encroachment.

2. Titles to water will become as definite and as easily ascertained as titles to land.

3. Water right litigation will rapidly decrease.

4. Information necessary to facilitate investments can be readily secured.

5. This would lead to rapid development of our water resources, increase our taxable wealth and indirectly promote other industries.

6. Capital would have opened for it a field of safe and profitable investment.

7. The laborer would have two new opportunities, one for work in the construction of canals, the other to obtain a home and the independence of farm life.

8. These benefits can be secured without cost to the general taxpayer of the State through the adoption of a system of fees payable to the State by those directly benefited.

SUMMARY.

In conclusion, I submit the following as a general summary of my brief discussion of the law of water conservation and use as it might be promoted and regulated by legislative enactments:

1. Complete State control of diversions from streams should be provided. No water right in the future should become vested except by appropriation under the laws, rules and regulations prescribed by the State, and the diversion of water without right from a public stream, including all knowingly wrongful interference with the rights of others, to the injury of another, should be made a misdemeanor.

2. A system should be provided whereby the priority and limitations of every existing right to the use of water can eventually be ascertained.

3. Provision should be made for a reliable record in some central office of all rights to the use of water as determined, and of new rights as initiated.

4. That actual measurements of ditches and streams be made as a basis for the adjudication of existing rights and for the initiation of new rights to the surplus waters.

5. To provide a definite procedure whereby rights to surplus water can be acquired.

6. That beneficial use should be the basis of all rights to the use of water, and that water for irrigation purposes should be made appurtenant to the land irrigated.

7. All rights to the use of water for power development should be limited to some specified time, subject to renewal under certain restrictions.

8. Permit the courts before which any litigation concerning irrigation or drainage connected with, caused or made necessary by irrigation, or other use of water by artificial means, to take judicial knowledge of all records, plats, and statistics concerning streams or bodies of water within the State prepared under the supervision and in the custody of the State Engineer making such plats, data, etc., *prima facie* evidence of the facts disclosed thereby.

9. An efficient administrative system, with proper officers for the distribution of the water supply among those entitled to its use, should be provided, which officers could be appointed by some designated officer in localities as needed.

10. An adequate system of fees, payable to the State by those benefited, should be provided for, so that eventually the system shall become self-supporting.